Mohamad Yusof bin Sainuddin v Sabah Development Bank Bhd

HIGH COURT (KOTA KINABALU) — BANKRUPTCY PETITION NO BKI-29–423/6 OF 2012
CHEW SOO HO J
23 JANUARY 2014

Bankruptcy — Petition — Setting aside — Bankruptcy petition filed based on a judgment in default ('JID') — Bankruptcy notice not challenged — Whether judgment debtor a contumacious litigant and should be estopped from challenging the JID — Whether ability to settle the judgment debt too speculative — Whether there was a miscarriage of justice to justify setting aside the JID — Bankruptcy Rules 1969 rr 18 & 117 — Rules of Court 2012 O 92 r 4

The appellant/judgment creditor ('JC') had on 17 February 2011 obtained a judgment in default ('JID') against the respondent/judgment debtor ('JD') for the sum of RM588,790.49. A bankruptcy notice was issued and served on the JD on 27 July 2012. JD did not dispute nor challenge the bankruptcy botice. Subsequently the JC took out a bankruptcy petition which was served on the JD. The JD then applied under rr 18 and 117 of the Bankruptcy Rules 1969 ('Rules') and O' 92 r 4 of the Rules of Court 2012 to strike out the bankruptcy petition. The JD contended that the JID obtained against him was premised on an on demand guarantee but no valid demand was made to him. The JD relied on the following grounds to set aside the bankruptcy petition: (i) that the debt was disputed on substantial grounds; (ii) that there was miscarriage of justice which warranted the court to go behind the JID; and (iii) that the JD was able to settle the debt. The JD contended that the JID was bad and wrong and that the court could go behind the JID to strike out or dismiss the bankruptcy petition. The JC contended that the JID was a good judgment and the court could not go behind the judgment. The senior assistant registrar ('SAR') allowed the JD's application thereby striking out the bankruptcy petition. Hence the present appeal by the JC against the decision of the SAR.

Held, allowing the appeal with costs of RM1,500:

(1) Despite JID being entered and the bankruptcy notice being issued and served personally, the JD seemed indifferent or plainly not interested to defend the claims against him or to challenge the debt or the bankruptcy notice. The JD led the JC to believe that he was not defending himself in any of these proceedings; that he was abandoning his right to challenge the JC's claim and judgment entered so that the JC could pursue with the execution against him. A contumacious litigant like the JD should be

estopped from raising the elemental issue of no-demand of the guarantee as an afterthought in the hearing of bankruptcy petition when such matter could have been raised and articulated at the earlier stage after the suit was served or even after bankruptcy notice was issued but not done at the first opportunity (see para 7).

(2) There had been sufficient notice of demand to the JD vide the suit filed to recover the sum due and owing, the JID and the bankruptcy notice (see para 7).

(3) As to the JD's contention that the judgment sum was able to be settled because the principal borrower had agreed to assign the proceeds from an arbitration proceedings to the JC in settlement of the judgment sum, such assignment was speculative since no arbitration proceeding had yet started (see para 9).

(4) There was no miscarriage of justice to justify the SAR to go behind the judgment to set aside or dismiss the bankruptcy petition (see para 10).

[Bahasa Malaysia summary

Perayu/pemiutang penghakiman ('PP') telah pada 17 Februari 2011 memperolehi penghakiman ingkar ('PI') terhadap responden/penghutang penghakiman ('JD') bagi jumlah sebanyak RM588,790.49. Notis kebankrapan dikeluarkan dan diserahkan kepada JD pada 27 Julai 2012. JD tidak mempertikaikan atau mencabar notis kebankrapan tersebut. PP kemudiannya memohon petisyen kebankrapan yang mana diserahkan atas JD. JD kemudiannya memohon di bawah k 18 dan 117 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah') dan A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 2012 untuk membatalkan petisyen kebankrapan. JD berhujah bahawa PI yang diperolehi terhadapnya adalah berasaskan atas jaminan tuntutan tetapi tiada tuntutan sah yang dibuat kepadanya. JD bergantung ke atas alasan-alasan berikut untuk mengetepikan petisyen kebankrapan: (i) bahawa hutang dipertikaikan atas alasan substansial; (ii) bahawa terdapat ketidakadilan yang mewajarkan mahkamah untuk mempertimbangkan PI tersebut; dan (iii) bahawa JD dapat melangsaikan hutang. JD berhujah bahawa PI adalah lapuk dan salah dan bahawa mahkamah boleh mempertimbangkan PI untuk membatalkan atau menolak petisyen kebankrapan tersebut. PP berhujah bahawa PI adalah penghakiman betul dan mahkamah tidak dapat mempertimbangkan penghakiman tersebut. Timbalan kanan pendaftar ('TKP') membenarkan permohonan dengan itu membatalkan petisyen kebankrapan. Maka rayuan ini oleh PP terhadap keputusan TKP.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM1,500:

(1) Meskipun PI dimasukkan dan notis kebankrapan dikeluarkan dan diserahkan secara peribadi, JD seperti tidak kisah atau tidak berminat

untuk mempertahankan tuntutan-tuntutan terhadapnya atau untuk mencabar hutang atau notis kebankrapan. JD membuatkan PP mempercayai bahawa dia tidak membela dirinya dalam mana-mana prosiding ini; bahawa dia menolak haknya untuk mencabar tuntutan PP dan penghakiman yang dimasukkan dengan itu PP dapat meneruskan dengan pelaksanaan terhadapnya. Litigan yang tegar seperti JD patut dihalang daripada membangkitkan isu dasar tiada tuntutan terhadap jaminan sebagai sesuatu yang difikirkan semula dalam pendengaran petisyen kebankrapan apabila perkara sedemikian boleh dibangkitkan dan disebut pada peringkat awal selepas tindakan diserahkan atau selepas notis kebankrapan dikeluarkan tetapi tidak dilakukan pada peluang pertama (lihat perenggan 7).

(2) Terdapat notis tuntutan yang mencukupi kepada JD melalui tindakan untuk mendapatkan semula jumlah yang kena dibayar dan patut dibayar, PI dan notis kebankrapan tersebut (lihat perenggan 7).

(3) Memandangkan hujahan JD bahawa jumlah penghakiman boleh diselesaikan kerana peminjam utama telah bersetuju untuk meletakhakkan hasil daripada prosiding timbang tara kepada PP dalam penyelesaian jumlah penghakiman tersebut, perletakhakkan sedemikian adalah spekulatif memandangkan tiada prosiding timbang tara telah bermula (lihat perenggan 9).

(4) Tidak terdapat ketidakadilan untuk menjustifikasi TKP untuk mempertimbangkan penghakiman untuk mengetepikan atau menolak petisyen kebankrapan (lihat perenggan 10).]

Notes

For cases on setting aside, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3597–3598.

Cases referred to

Affin Bank Bhd v Tan Sri Kishu Tirathrai [2008] 3 MLJ 72; [2008] 2 CLJ 448, CA (refd)

Bintulu Realty Estate Sdn Bhd v Samat bin Haji Othman [1993] MLJU 153; [1993] 4 CLJ 571, HC (refd)

Eastern, In re (1893) 10 Mor 111 (refd)

Gulf Business Construction (M) Sdn Bhd v Israq Holdings Sdn Bhd [2010] 5 MLJ 34; [2010] 8 CLJ 775, CA (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (refd)

Lai Yoke Ngan v Chin Teck Kwee [1997] 2 MLJ 565 (refd)

Lee Bak Soon @ Lee Pak Choon v RHB Bank Bhd [2008] 1 MLJ 762; [2008] 1 CLJ 237, CA (refd)

Mok Hin Wah & Ors v United Malayan Banking Corp Bhd [1987] 2 MLJ 610, SC (not folld)

Patel Holding Sdn Bhd v Estet Pekebun Kecil Sdn Bhd & Anor [1989] 1 MLJ 190; [1990] 2 CLJ (Rep) 280, HC (refd)
Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 100; [1991] 1 CLJ (Rep) 344, SC (refd)
Sovereign General Insurance Sdn Bhd v Koh Tian Been [1988] 1 MLJ 304; [1988] 1 CLJ (Rep) 277, SC (refd)
Tioh Ngee Heng; exp Yap Kin Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Sharif bin Haji Hussain), Re [2000] 6 MLJ 155, HC (refd)
Vijendran a/l Ponniah v Bank of Commerce [1998] 7 MLJ 418; [1999] 5 CLJ 69, HC (refd)

Legislation referred to

Bankruptcy Rules 1969 rr 18 , 117
Rules of Court 2012 O 56 r 1, O 92 r 4
Rules of the High Court 1980 O 42 r 12

Saiful Moktar (Jayasuriya Kah & Co) for the plaintiff.
Baldev Gan (Baldev Gan & Assoc) for the defendant.

Chew Soo Ho J:

INTRODUCTION

[1] Enclosure 22 is an appeal under O 56 r 1 of the Rules of Court 2012 by Sabah Development Bank Bhd ('the judgment creditor') against the senior assistant registrar's ('SAR') decision made on 28 March 2013 in allowing the judgment debtor's application under rr 18 and 117 of the Bankruptcy Rules 1969 ('the BR 1969') and O 92 r 4 of the Rules of Court 2012 thereby dismissing or striking out or setting aside with costs the bankruptcy petition dated 2 October 2012 filed by the judgment creditor.

[2] The judgment debtor ('JD') had relied on three grounds primarily to set aside the bankruptcy petition and these grounds are:

(a) the debt is disputed on substantial grounds;

(b) there is miscarriage of justice which warrants the court to go behind the judgment; and

(c) the JD is able to settle the debt.

[3] The undisputed fact is that the judgment creditor had on 17 February 2011 obtained a judgment against the JD for the sum of RM588,790.49 with interest and costs which was not set aside at the time when the bankruptcy petition was filed. Proceeding this bankruptcy petition, bankruptcy notice was

issued and served on the JD on 27 July 2012 by personal service. JD did not dispute nor challenge the said bankruptcy notice. It was only when this bankruptcy petition was taken out and served by personal service also on the JD that he is currently raising his challenge.

BRIEF CONTENTIONS/SUBMISSIONS BY BOTH PARTIES

[4] Basically the JD's contention is that the judgment in default obtained against him was premised on an on demand guarantee but no valid demand was made to him citing the case of *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (SC) which held that in respect of an on demand guarantee, a proper demand to the guarantor is a condition precedent to suing the guarantor. When the judgment in default was allegedly bad and wrong, JD contended that the court can go behind the judgment citing *Bintulu Realty Estate Sdn Bhd v Samat bin Haji Othman* [1993] MLJU 153; [1993] 4 CLJ 571 to strike out or dismiss the bankruptcy petition.

[5] Judgment creditor, contended that the default judgment until set aside is a good judgment and enforceable judgment citing *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 100; [1991] 1 CLJ (Rep) 344 (SC). And when the default judgment was not paid, judgment creditor can enforce by execution which can take the form of bankruptcy proceeding citing *Vijendran a/l Ponniah v Bank of Commerce* [1998] 7 MLJ 418; [1999] 5 CLJ 69. Quoting *Sovereign General Insurance Sdn Bhd v Koh Tian Been* [1988] 1 MLJ 304; [1988] 1 CLJ (Rep) 277 where the Supreme Court has held, inter alia, that in the exercise of his jurisdiction in bankruptcy proceedings that the learned judge cannot go behind the judgment, judgment creditor contended that the SAR should not have gone behind the judgment. On an application to set aside a bankruptcy notice it was submitted that it was laid down as early as 1892 that the court could not go behind the judgment, see *In re Eastern* (1893) 10 Mor 111 per Lee Hun Hoe CJ (Sabah and Sarawak). The *Sovereign General Insurance*'s case was followed by the Court of Appeal in *Affin Bank Bhd v Tan Sri Kishu Tirathrai* [2008] 3 MLJ 72; [2008] 2 CLJ 448; *Lee Bak Soon @ Lee Pak Choon v RHB Bank Bhd* [2008] 1 MLJ 762; [2008] 1 CLJ 237 and *Gulf Business Construction (M) Sdn Bhd v Israq Holdings Sdn Bhd* [2010] 5 MLJ 34; [2010] 8 CLJ 775. High Court cases of *Re Tioh Ngee Heng; exp Yap Kin Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Sharif bin Haji Hussain)* [2000] 6 MLJ 155 and *Patel Holding Sdn Bhd v Estet Pekebun Kecil Sdn Bhd & Anor* [1989] 1 MLJ 190; [1990] 2 CLJ (Rep) 280, were citied in support of the judgment creditor's submission that until the judgment dated 17 February 2011 is set aside, it is an enforceable judgment and the bankruptcy court should not entertain the allegation that there was miscarriage of justice. Referring to JD's ground that JD is able to settle the debt relying on the proceeds of an arbitration proceeding which the principal borrower, Seri Wacana Sdn Bhd had agreed to assign to the judgment creditor in settlement of

A the judgment sum, judgment creditor contended that JD's argument is speculative and misconceived for reasons that the arbitration proceeding has not even commenced and it is highly speculative to assume that the principal borrower would succeed in the arbitration proceeding.

B FINDINGS OF THE COURT

[6] On the date for the decision of this appeal, I have allowed this appeal subject to full ground and I append below my grounds of decision.

C **[7]** From the facts and evidence in this appeal the only contention put forward by the respondent ('judgment debtor') is that there was allegedly no demand made to him when the suit was taken out by the appellant ('judgment creditor') against him leading to the judgment in default being entered and ultimately the bankruptcy notice and this bankruptcy petition being D presented. It is noted that service of cause papers and other documents on the respondent were made by personal service which the respondent had never challenged. However, despite judgment in default of appearance had been entered, bankruptcy notice having been issued and served personally, respondent seemed indifferent or plainly not interested to defend the claims E against him or to challenge the debt or the bankruptcy notice. I do not find it just that the respondent should hold the appellant at abeyance by remaining mute over the judgment and the bankruptcy notice until such time that he is to be declared a bankrupt vide bankruptcy petition that he is attempting to challenge the bankruptcy petition by alleging that there was no demand made F when he was well aware of the suit being filed to claim from him as a guarantor arising from a guarantee he had executed in favour of the appellant to guarantee payments of the facilities granted to the principal borrower should the latter fail to pay the loans and interest thereof. Otherwise, he would have entered appearance to defend himself as the defendants/appellants in *Mok Hin Wah*'s G case did. To reiterate, the respondent has never challenged the claim against him; he has never challenged the guarantee executed in favour of the appellant; he has never objected to the judgment in default entered against him nor the bankruptcy notice issued and granted by the court. He led the appellant to believe that he is not defending himself in any of these proceedings that he is H abandoning his right to challenge the appellant's claim and judgment entered so that the appellant can pursue with the execution against him. I hold the view that a contumacious litigant like the respondent should be estopped from raising the elemental issue of no-demand of the guarantee as an afterthought in the hearing of bankruptcy petition when such matter could have been raised I and articulated at the earlier stage after the suit was served or even after bankruptcy notice was issued but not done at the first opportunity; see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC). If it is the respondent's contention that the judgment in default was irregular or wrong in law, he ought to have applied to set it aside; again he never did. To attempt to

challenge the validity of the judgment in default now is an attempt to short circuit the process of having to apply to set aside the judgment in default for which the respondent had been well aware of all along but had taken no step to protect his interest. *Ipso facto*, there has been sufficient notice of demand to the respondent vide the suit filed to recover the sum due and owing, the judgment in default and the bankruptcy notice which respondent had paid no heed. I do not think it right for the respondent to contend now purely on this technical ground of a demand for payment when he had more than adequate notice of such a demand through the claim leading to the judgment in default and the bankruptcy notice, all of which were served on him personally. It must be noted that the respondent had never challenged the judgment debt and interest thereof which can only be construed that the debt and interest are indirectly admitted to be correct. The need to go behind the judgment is dismissed when the judgment debt itself is not disputed save for the on demand issue. In the *Bintulu Realty Estate Sdn Bhd v Samat bin Haji Othman* relied on by the respondent it was held by the High Court that the judgment in question must be irregular or wrong upon scrutiny that the court allowed the bankruptcy petition which relied on such irregular or wrong judgment to be struck out or dismissed. That judgment in default in *Bintulu Realty*'s case was indeed wrong or irregular *ex facie* as it purportedly included interest from 24 June 1986 when the judgment was obtained on 6 November 1989 which clearly infringes O 42 r 12 of the Rules of the High Court 1980 then which provided that interest was to be calculated from the date of the judgment only. From the authorities referred to in the *Bintulu Realty Estate*'s case and the decision therein, the scrutiny that the SAR or the bankruptcy court should undertake in order to go behind the judgment is practically on the 'debt' in the judgment and the debt transgressed onto the bankruptcy notice. However, in the instant case, the debt is virtually undisputed. This is affirmed by the principal borrower agreeing to assign the proceeds of arbitration to settle the judgment debt which the respondent endorsed. There is thus so basis and in fact no necessity to undertake a scrutiny of the judgment debt which is undisputed. Further, I do not find any fraud or illegality which goes to vitiate the judgment in default against the respondent. It is trite that in the exercise of the court's jurisdiction in bankruptcy proceedings the court ought not to go behind the judgment, see the oft-quoted Supreme Court case of *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* and it is equally trite law that a judgment regularly obtained is valid and enforceable until set aside; see the cited cases of *Re Tioh Ngee Hong* and *Patel Holding Sdn Bhd*. In addition, there is no evidence that the respondent has ever made any payment towards settlement of the judgment debts and interest under the guarantee he had covenanted. As it is, the judgment debt remains due and payable. It would thus be unjust that the appellant should be deprived of their rights to execution.

[8] The respondent has relied on the Supreme Court case of *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* that there was no demand by notice

and hence judgment entered could the set aside. The distinction that can be drawn from the facts in *Mok Hin Wah*'s case and the present appeal is that in the former the appellants/defendants had challenged the issue of on demand at the first opportunity when the writ was filed against them in the first instant trial. In the present case, no challenge was taken or defence entered to raise such issue when the writ was served. I hold the view that even if *Mok Hin Wah*'s principle is applicable, it may justify the respondent to apply to set aside the default judgment when it was served on him but it does not justify the bankruptcy court at this stage to go behind the judgment to determine the validity of the judgment granted if the respondent was interested of his right, he could also have appealed as in *Mok Hin Wah*'s case but did nothing at all. I am inclined to hold the view that in the circumstances of this case, the SAR should not have gone behind the judgment to decide on the validity of the judgment against the respondent.

[9] Referring to the respondent's contention that the judgment sum is able to be settled because the principal borrower had agreed to assign the proceeds from an arbitration proceedings to the appellant in settlement of the judgment sum, i am more inclined to agree with the appellant's submission that such assignment is speculative since no arbitration proceeding has yet started. I find that the appellant undoubtedly has the right after obtaining judgment whether to accede to any arrangement for settlement or to proceed to executions which include filing bankruptcy proceeding; the choice is on them.

[10] On the totality of the evidence, I do not find any miscarriage of justice to have existed to justify the SAR to go behind the judgment to set aside or dismiss the bankruptcy petition. Consequently, I allow this appeal and set aside the decision and order of the SAR dated 28 March 2013, with costs of RM1,500 to the appellant.

Appeal allowed with costs of RM1,500.

Reported by Kanesh sundrum